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No. 90-644

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES G. LEDBETTER, COMMISSIONER,
GEORGIA DEPARTMENT OF HUMAN RESOURCES,
PETITIONER

v.

MARTA O. TURNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Respondents are Georgia residents who received lump-sum payments that rendered them temporarily ineligible for benefits under the Aid to Families with Dependent Children (AFDC) program. The district court held that notices of termination issued by the Georgia Department of Human Resources were inadequate, and petitioner did not appeal that ruling. The questions presented are:

1. Whether, as a result of the inadequate notices, respondents are entitled to retain AFDC benefits in excess of those authorized by Congress.

2. Whether the district court's order enjoining petitioner from recouping the excess benefits violates the Eleventh Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) program provides financial aid to needy children and to the parents or relatives with whom they are living. See 42 U.S.C. 601 *et seq.*; *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974). States that provide such assistance are partially reimbursed by the federal government.[1] The States must administer

[1] The federal government pays a share of the cost of AFDC benefits under a formula that takes into account a State's per capita income relative to national per capita income. The fed-

the AFDC program in conformity with applicable federal statutes and regulations.

Congress has required the States' AFDC plans to provide for the prompt correction of payment errors, including both overpayments and underpayments. See 42 U.S.C. 602(a)(22). If the recipient of an overpayment is still receiving AFDC benefits when the overpayment is discovered, recovery is made by reducing future AFDC benefits to not less than "90 percent of the amount payable under the State plan to a family of the same composition with no other income." 42 U.S.C. 602(a)(22)(A). In Georgia, this rate is set by the State at 95% where the overpayment is due to a government error; in other words, the rate of recovery in such cases is limited to 5% of the maximum monthly AFDC payment. See Pet. 23 n.6.

A state agency may not terminate AFDC benefits without providing the recipients with pre-termination notice and an opportunity to be heard. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Federal regulations provide that an action "intended * * * to discontinue, terminate, suspend or reduce assistance" must be preceded by "timely and adequate notice." 45 C.F.R. 205.10(a)(4)(i). The regulations further provide:

> (A) "Timely" means that the notice is mailed at least 10 days before the date of action, that

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eral matching rate for AFDC benefits currently ranges from 50% to 77.5%. In addition, the federal government pays 50% of AFDC administration and training costs, 75% of the cost of a fraud control program, 90% of the cost of a mechanized claims-processing and information-retrieval system, and 100% of the cost of verifying immigration status. See 42 U.S.C. 603, 1318, 1396d(B).

> is, the date upon which the action would become effective;
>
> (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, the circumstances under which assistance is continued if a hearing is requested, and if the agency action is upheld, that such assistance must be repaid.

Ibid.

2. a. Prior to 1981, an AFDC household that received a lump-sum payment (such as an inheritance or lottery winnings) was ineligible for AFDC benefits in the month the lump sum was received and thereafter until the funds had been spent. The Secretary of Health and Human Services became concerned that this approach discouraged families from conserving lump sums for basic household expenses, and instead encouraged them to spend such sums rapidly in order to regain eligibility for AFDC benefits. Congress addressed this problem in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2321, 95 Stat. 859-860, by providing that receipt of a lump sum disqualifies an AFDC household for as many months as the lump sum would meet the family's standard of need. See 42 U.S.C. 602(a)(17); *Lukhard* v. *Reed*, 481 U.S. 368, 371-372 (1987).

b. Respondents, representing a class of plaintiffs comprising all Georgia residents "who have been or will be found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income" (Pet. App. 33a), brought this action in July 1986 against petitioner,

the Commissioner of Georgia's Department of Human Resources. Respondents complained, *inter alia*, that persons who reported lump-sum income did not receive adequate notices of termination. The notice stated:

> Reason and Regulation for Action: Your income exceeds the payment standard in Georgia. Regulation: All countable income is budgeted against the state payment amount. Section: IV.

Pet. App. 40a.[2]

On respondents' motion for summary judgment, the district court held (Pet. App. 40a) that this notice was inadequate under 45 C.F.R. 205.10(a)(4)(i)(B). The district court concluded that the termination notice "fails to meaningfully inform the recipient of the reasons for the termination of AFDC or the impact that termination is likely to have on the recipient's future eligibility." Pet. App. 40a. As part of the remedy for the inadequate notice, the district court enjoined petitioner from undertaking any efforts to collect overpayments from AFDC recipients "who did not receive an adequate notice of termina-

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[2] The notice also provided a telephone number for obtaining free legal services, and stated:

> If, for any reason, you think proper consideration has not been given your situation, you have the right to appeal to the State Department of Human Resources for a fair hearing. Procedures for requesting a fair hearing are on the back of this form.
>
> If you request a fair hearing within 10 days from the date at the top of this form, your benefits will be continued or returned to the amount you received prior to this action unless the hearing officer decides the sole reason is one of State or Federal law or policy.

Compl. Exh. A.

tion when they reported the receipt of a lump sum." *Id.* at 28a-29a. Petitioner's motion for reconsideration of this aspect of the court's order was denied by the district court.[3] *Id.* at 13a-14a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The only issue before that court was whether the district court had properly enjoined petitioner from recouping benefits "which the recipients received in violation of current AFDC program requirements but which they were entitled to receive under the previous law." *Id.* at 5a. The court recognized that federal law requires state agencies promptly to recover any overpayment under the AFDC program, *ibid.* (citing 42 U.S.C. 602(a)(22)), and noted that the Secretary defines an "overpayment" as a "financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible," *ibid.* (quoting 45 C.F.R. 233.20(a)(13)(i)). In this case, however, the district court held that the notices of termination were inadequate under federal regulations, and petitioner elected not to appeal that determination. The court of appeals determined (Pet. App. 6a) that the State's failure to appeal on the notice issue distinguished this case from *Gardebring* v. *Jenkins*, 485 U.S. 415 (1988).

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[3] The district court initially held (Pet. App. 35a-41a) that petitioner had also failed to provide respondents with adequate written notice of the new lump-sum rule, in violation of 45 C.F.R. 206.10(a)(2)(i). On motion for reconsideration, the district court reversed itself on this point in light of this Court's decision in *Gardebring* v. *Jenkins*, 485 U.S. 415 (1988). See Pet. App. 18a-19a. In addition, the district court held (*id.* at 41a-44a) that petitioner improperly terminated respondents from the Medicaid Program. Neither issue is presented in the petition for certiorari.

The court of appeals held that, because petitioner's notice of termination failed to meet the requirements of the federal notice regulations, "the state's attempted termination of the recipients' AFDC benefits became invalid." Pet. App. 6a (citing *Kimble* v. *Solomon*, 599 F.2d 599, 604 (4th Cir.), cert. denied, 444 U.S. 950 (1979)). "Because the state did not terminate the recipients in accordance with federal notice requirements," the court held, "the recipients' entitlement to aid was not affected. Consequently, they did not receive any overpayment." Pet. App. 7a. The court concluded that "any benefits the recipients received must be examined under pre-1981 law to determine whether the recipients were eligible to receive such funds," *id.* at 6a-7a, and noted the absence of any suggestion that respondents had received benefits to which they were not entitled under pre-1981 law.

The court of appeals also held (Pet. App. 7a-9a) that the Eleventh Amendment did not bar the district court from enjoining the State's efforts to recoup benefits because, in the court's view, the injunction did not impose a retrospective remedy but rather "sought to prevent state officials from future violations of federal law." Pet. App. 8a. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Recognizing that the Eleventh Amendment bars AFDC recipients who did not appeal their terminations from seeking damages from the State, the court held that, because the State's inadequate notice did not affect recipients' entitlement to benefits, respondents did not receive an overpayment. The court rejected petitioner's argument that payments made to respondents during the pendency of their appeals are a form of compensation forbidden under *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

Since the benefits "were legally awarded," they "cannot be fairly characterized as compensatory." Pet. App. at 9a.

DISCUSSION

The court of appeals' decision rests on the view that Congress's decision to reduce AFDC entitlements is effective with respect to an individual claimant only after that claimant receives adequate notice of the reduction. We think that view is both incorrect and inconsistent with decisions of other courts of appeals in cases presenting related remedial issues. Moreover, the question decided by the court of appeals is of great importance to the administration of AFDC and other welfare programs. This Court granted certiorari on essentially similar questions in *Gardebring* v. *Jenkins*, 485 U.S. 415 (1988), and *Atkins* v. *Parker*, 472 U.S. 115 (1985), although it did not reach the remedial issue in either case. See 485 U.S. at 418; 472 U.S. at 123. Certiorari is also warranted in this case.

1. a. Because petitioner did not appeal from the district court's determination that the notices of termination were inadequate under 45 C.F.R. 205.10(a)(4)(i)(B), the court of appeals addressed only the question of the appropriate remedy for the inadequate notices.[4] The result of the state agency's failure to comply with federal notice regulations, the court said,

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[4] In fact, the termination notice met many of the requirements of 45 C.F.R. 205.10(a)(4)(i)(B). It was in writing, it informed the recipients that the agency intended to terminate AFDC benefits, it gave a general statement of the reason for the action (and provided a telephone number to obtain additional information), and it informed recipients of their right to hearing, and to continued benefits pending a hearing. See p. 4 and note 2, *supra*.

was that "the recipients' entitlement to aid was not affected." Pet. App. 7a. Thus, in the court of appeals' view, Congress's decision to amend the lump-sum rule in 1981 had no effect on respondents' entitlements, and respondents' benefits "must be examined under pre-1981 law." *Id.* at 6a.

The court of appeals' analysis confuses a claimant's *entitlement* to AFDC benefits with the *procedures* for ensuring that claimants receive the benefits to which they are entitled. This Court has recognized that Congress ha[s] plenary power to define the scope and the duration of the entitlement to [welfare] benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program." *Atkins* v. *Parker*, 472 U.S. at 129. A rule that made entitlements turn on the action or inaction of welfare officials would be inconsistent with the principle that payments of money from the Treasury are limited to those authorized by Congress. See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

Congress has provided that a family in receipt of lump-sum income "*shall* be ineligible for aid" for a period of months equal to the amount received divided by the family's monthly standard of need. 42 U.S.C. 602(a)(17)(A) (emphasis added). And Congress expressly provided that the lump-sum rule "shall become effective on October 1, 1981" (or, if amendments to state law were necessary, on the first month after the first state legislative session ending on or after October 1, 1981). 95 Stat. 859-860. Thus, "Congress gave no indication whatsoever that the effective date for the new lump-sum rule could be de-

layed by the action or inaction of state agencies." *Gardebring* v. *Jenkins*, 485 U.S. 415, 438 (1988) (O'Connor, J., concurring in the judgment in part and dissenting in part).

In addition, Congress required that state agencies "promptly take all necessary steps to correct *any* overpayment or underpayment of aid under the State plan." 42 U.S.C. 602(a)(22) (emphasis added). Although Section 602(a)(22) contains an exception for individuals who are no longer receiving benefits in cases where the cost of recovery would equal or exceed the overpayment, it contains no exception for overpayments that result from agency errors. Accordingly, the Secretary's regulations define "overpayment" broadly as any "financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible." 45 C.F.R. 233.20(a)(13)(i). Nothing in the statute or the regulation suggests that the adequacy of the notice of a reduction in benefits determines whether the recipient has received an overpayment. The court of appeals' decision to the contrary is "clearly inconsistent with federal law." *Gardebring*, 485 U.S. at 437 (O'Connor, J., concurring and dissenting).

b. The court of appeals did not hold that the notices of termination in this case were constitutionally inadequate, nor did it base its decision on the Due Process Clause.[5] But in any event, the judgment in this case cannot be affirmed on due process grounds.

In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), this Court held that the Due Process Clause requires state agencies to afford AFDC recipients notice and an oppor-

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[5] The court's discussion appears under the heading "Statutory Provisions," and cites only the notice provisions of 45 C.F.R. 206.10. See Pet. App. 6a-7a.

tunity to be heard before terminating their benefits. Nothing in *Goldberg* suggests that a recipient's right to procedural due process alters his substantive entitlement to welfare benefits. On the contrary, the Court noted that termination of benefits pending a hearing "may deprive an *eligible* recipient" of benefits, *id.* at 264, and said that the function of a pretermination hearing is to "protect a recipient against an *erroneous* termination of his benefit," *id.* at 267 (emphasis added). Moreover, the Court acknowledged the availability of recoupment under the governing law when it expressly noted the impracticability of recoupment in a case in which benefits had been stopped completely. The Court said: "[T]he benefits paid to ineligible recipients pending decision at the hearing *probably* cannot be recouped, since these recipients are likely to be judgment-proof." *Id.* at 266 (emphasis added).

This Court's subsequent decisions have consistently recognized that the Due Process Clause itself does not create substantive property rights. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976) (protected interest in continued receipt of disability benefits is "statutorily created"); *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972) ("Property interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971) (*Goldberg* "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits"). See also *U.S. Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 174

(1980) (Congress may alter or eliminate non-contractual benefits at any time).[6]

Respondents contend (Br. in Opp. 8) that "the guarantees of the due process clause of the Constitution and the notice statutes and regulations are illusory" unless the government is required to give welfare recipients adequate notice before altering their substantive entitlement to welfare benefits. But as this Court recognized in *Goldberg*, the purpose of a pre-termination notice and hearing is to protect AFDC recipients from mistakes due to "honest error or irritable misjudgment." 397 U.S. at 266. Where the notice of termination is inadequate, the Due Process Clause affords the right to adequate notice and an opportunity to be heard, not a right to benefits in excess of those appropriated by Congress. In appropriate cases, the remedy for a procedural due process violation may include "*Quern* notices" to absent class members informing them of their right. See *Quern* v. *Jordan*, 440 U.S. 332 (1979). In other cases, file reviews may substitute for new notices. See *Foggs* v. *Block*, 722 F.2d 933 (1st Cir. 1983), rev'd on other grounds, 472 U.S. 115 (1985). These remedies, far from being "illusory," vindicate respondents' right to procedural due process. It is respondents who are seeking a remedy for an illusory constitutional right

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[6] Other decisions of this Court reinforce the conclusion that constitutionally inadequate procedures do not alter substantive entitlements. See *Carey* v. *Piphus*, 435 U.S. 247, 260 (1978) (if students would have been suspended had a proper hearing been held, they are not entitled to damages for injuries caused by the suspension); *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) ("[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute * * * which has some significant bearing on the employee's [protected interest].").

to retain welfare benefits never appropriated by Congress.[7]

Respondents also contend (Br. in Opp. 13) that the inadequate notices "placed the most vulnerable in our society, poor mothers and children, in dire life-threatening circumstances." To the extent that respondents are contending that the government is estopped from recouping AFDC benefits because it failed adequately to inform recipients of the reduction in their benefits, respondents are incorrect. See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Moreover, any harshness in this case results principally from the lump-sum rule itself rather than inadequate notice of the rule. As the Court noted in *Gardebring*, "it is not irrational to assume that most needy families will realize that the receipt of a large lump sum may affect future eligibility for benefits." 485 U.S. at 431. That assumption certainly is warranted in this case, since many respondents actually reported lump-sum income to the state agency. In addition, the 5% limitation on recoupment significantly mitigates the harshness of the result. See p. 2 *supra*.

2. The court of appeals' decision is inconsistent with the views expressed in Justice O'Connor's separate opinion in *Gardebring* v. *Jenkins*. *See* 485 U.S. at 437-438 (concluding that lump-sum rule applies whether or not recipient received notice in accord

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[7] Of course, if an overpayment is to be recovered by reducing a recipient's future benefits for a period of months, the recipient is entitled to adequate notice that such a reduction will occur. But that is not the issue here; the question presented by the decision below is whether an inadequate notice of termination precludes *any* recovery of overpayment on the theory that, as a result of the inadequate notice, there has been no overpayment at all.

with Secretary's regulation). In addition, the decision in this case is at odds with two decisions of the Ninth Circuit and one decision of the First Circuit on closely related remedial issues.

In *Medberry* v. *Hegstrom*, 786 F.2d 1389 (1986), the Ninth Circuit concluded that, where AFDC payments are continued pending a hearing, the period of ineligibility under the lump-sum rule runs from the receipt of the lump sum, not from the date the hearing is concluded. The Ninth Circuit agreed with the Secretary that "[i]f the family receives benefits during any month of the ineligibility period," the benefits must be treated as overpayments and recouped under 42 U.S.C. 602(a)(22), "irrespective of * * * any procedural delays in terminating benefits, such as a request for a fair hearing." 786 F.2d at 1391.

In *Turner* v. *McMahon*, 830 F.2d 1003 (1987), cert. denied, 488 U.S. 818 (1988), the Ninth Circuit held that state agencies are required to recoup AFDC payments made "under compulsion of an erroneous court order subsequently reversed by the Supreme Court." [8] 830 F.2d at 1005. The court concluded that

> [t]he plain language of [42 U.S.C.] 602(a)(22) mandating recovery of "any overpayment" does not distinguish between classes of overpayments that may be recouped. * * * Instead, use of the adjective "any" indicates that Congress intended that overpayments must be recouped without restriction.

830 F.2d at 1007. The Ninth Circuit noted that its reading of Section 602(a)(22) was reinforced by

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[8] The erroneous court order prohibited the state agency from treating mandatory payroll deductions as income to claimants. See *Turner* v. *Woods*, 559 F. Supp. 603 (N.D. Cal. 1982), aff'd, 707 F.2d 1109 (9th Cir. 1983), rev'd *sub nom. Heckler* v. *Turner*, 468 U.S. 1305 (1984).

the Secretary's regulation, which "broadly defines an overpayment as money received which exceeds the amount the individual was entitled to receive." *Ibid.* (citing 45 C.F.R. 233.20(a)(13)(i)).

Medberry and *Turner* cannot be reconciled with the court of appeals' conclusion in this case that, as a result of the inadequate notices, respondents received no overpayment. Whether the excess benefits are paid because the claimant pursues an administrative appeal (as in this case and in *Medberry*), or because of a court order (as in *Turner*), benefits in excess of the amounts authorized by Congress are "overpayments" subject to recoupment under 42 U.S.C. 602(a)(22).

The court of appeals' decision is also incompatible with the First Circuit's decision in *Foggs* v. *Block*, 722 F.2d 933 (1983), rev'd on other grounds *sub nom. Atkins* v. *Parker*, 472 U.S. 115 (1985). *Foggs* arose under the Food Stamp program, but it presented the same basic remedial question: whether, as a result of an inadequate notice of program changes, a welfare claimant may be entitled to benefit payments in excess of those authorized by Congress.[9] The First Circuit observed that "[p]ublic distributive programs are subject to majority action, i.e., Congress, which can increase, decrease, and terminate benefits." 722 F.2d at 937. Accordingly, the First Circuit declined to require the payment of "a windfall to recipients" who were seeking "a continuation of benefits at a level exceeding that authorized by Congress." 722 F.2d at 941. Instead, the court directed the state agency to review its files, and to restore benefits in any case

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[9] In *Atkins* v. *Parker, supra,* this Court reversed the First Circuit's holding that the notices were inadequate. Consequently, this Court did not consider the First Circuit's resolution of the remedial issue.

where claimants had received less than the amounts to which they were entitled by statute.[10] *Ibid.*

Respondents cite three court of appeals decisions for the proposition that "an improper or illegal individual notice will bar attempted termination of benefits." Br. in Opp. 8 (citing *Caldwell* v. *Wallace*, 755 F.2d 870 (11th Cir. 1985); *Buckhanon* v. *Percy*, 708 F.2d 1209 (7th Cir. 1983), cert. denied, 465 U.S. 1025 (1984); and *Kimble* v. *Solomon*, 599 F.2d 604 (4th Cir.), cert. denied, 444 U.S. 950 (1979)). But this formulation begs the question. It is true that federal courts may enjoin the reduction or termination of AFDC benefits until such time as the recipients have been given adequate notice and an opportunity to be heard. *Goldberg* v. *Kelly*, *supra*. Yet it does not follow that inadequate notice alters a claimant's substantive entitlement to welfare benefits or prevents state agencies from recouping payments in excess of those authorized by Congress.

In *Caldwell*, a Medicaid case, the state agency directed a notice of termination to the claimant's son, whose interest conflicted with the claimant's, rather than to the claimant herself. In ordering that a new notice be sent directly to the claimant, the court specifically stated that "[i]t is the lack of notice, and not the issue of entitlement, that concerns us." 755 F.2d at 873. The court did not consider, let alone approve, an injunction prohibiting the state from collecting overpayments.

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[10] Respondents attempt to distinguish *Foggs* on the ground that it concerned "mass notices" of a legislative change rather than individual notices of termination. Br. in Opp. 7-8. But respondents offer no convincing reason why inadequate individual notices, but not inadequate mass notices, should alter substantive entitlements to AFDC benefits.

The other two cases cited by respondent hold that it does not violate the Eleventh Amendment to order a State "to provide benefits under the prereduction standards until such time as the state effected a legally effective reduction of benefits by mailing adequate notice." *Buckhanon*, 708 F.2d at 1216 (citing *Kimble* v. *Solomon*, *supra*). Neither *Buckhanon* nor *Kimble* held that payments received pursuant to such an injunction are not "overpayments," nor did the courts in those cases permanently enjoin collection of such overpayments.

As a result of the court of appeals' decision in this case, AFDC claimants in Georgia who appealed their terminations, but not similarly situated recipients in other States, are "entitled" to have their benefits calculated under the pre-1981 lump-sum rule.[11] The decision thus creates a windfall for some recipients of lump sums. See *Johnson* v. *Likins*, 568 F.2d 79, 85 (8th Cir. 1977).

3. Petitioner also asks this Court to consider whether the district court's order enjoining petitioner from recouping overpayment of AFDC benefits violates the Eleventh Amendment. Pet. 18-25. In our view, this question—on which the courts of appeals are not in conflict—does not warrant certiorari.

If the Court agrees with us that the defective notices in this case did not alter respondents' sub-

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[11] Under the court of appeals decision, pre-1981 law applies to respondents who were not participating in the AFDC program in 1981, including Betty J. Wirtz (who applied for AFDC benefits in May 1986), Bonnie K. Allgood (who applied for AFDC benefits in July 1986), and Marta O. Turner (who applied for AFDC benefits in July 1984). See Plaintiffs' Statement of Undisputed Material Facts para. 31 and Attachment 3; Affidavit of Marta O. Turner para. 2 (Feb. 23, 1987).

stantive entitlement to AFDC benefits, it need not reach the Eleventh Amendment issue. The State is authorized and required by 42 U.S.C. 602(a)(22) to recoup overpayments to respondents. For that reason (and quite apart from Eleventh Amendment concerns), the district court's order enjoining petitioner from recouping overpayments is incorrect.

If, on the other hand, this Court agrees with the court of appeals that respondents were entitled to the benefits they have already received, then we believe the court of appeals was correct in holding that the Eleventh Amendment does not bar an order forbidding the State to recoup those benefits. It is true, as the court of appeals recognized (Pet. App. 8a), that the Eleventh Amendment bars AFDC recipients who did not appeal their terminations from seeking retroactive benefits. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See also *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("Compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."). But it does not follow that the Eleventh Amendment confers on the States a prospective right to recover welfare benefits (1) that have already been paid and (2) to which the recipients were entitled. Although "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* [209 U.S. 123 (1908)] will not in many instances be that between day and night," *Edelman*, 415 U.S. at 667, this Court's Eleventh Amendment decisions do not support the proposition that enjoining a state from recouping past welfare payments is "tantamount to requiring the State to provide retroactive benefits." Pet. 25. Accordingly, we believe the Eleventh Amendment issue warrants no further review.

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CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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